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NO. 82-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

CARL EDWIN WIGGINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT "PRO SE"

Carl Edwin Wiggins, Respondent
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QUESTIONS PRESENTED

I. WHETHER, ON THE BASIS OF FACTS REFLECTED IN THE AVAILABLE RECORD, AND ALLEGATION OF UNDISPUTED FACTS ALLEGED IN THE ORIGINAL PLEADINGS, THE RESPONDENT WAS DEPRIVED OF HIS RIGHT TO SELF-REPRESENTATION ON ACCOUNT OF THE ACTIONS BY STAND-BY COUNSELS?

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422 U.S. 806 (1975) 2

SUPPLEMENTAL BRIEF OF RESPONDENT "PRO SE"

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Carl Edwin Wiggins, respectfully submits his supplemental brief, pro se, in addition to the brief on the merits filed by Respondent's court appointed counsel.

STATEMENT OF THE CASE

A. Course Of The Proceedings Below.

Respondent agrees generally with Petitioner's description of the course of the proceedings below, except that part which states: "Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty page appellate brief." (Pet. brief at 3). The order of briefs filed in the direct appeal to the Texas Court of Criminal Appeals was the Respondent timely filed his one hundred fifty page brief *then* the court appointed counsel filed an appellate brief - and a Commissioner of the State Appeals Court treated counsel's brief as representation of the appeal and, in a single statement that the "Appellant's pro se brief is totally without merit," affirmed the conviction. 520 S.W. 2d 780 (Tex. Crim. App. 1975).

B. Statement Of The Facts

Respondent, in addition to the reasons cited by his court appointed counsel, does not agree with Petitioner's statement of facts to the extent it appears to attempt to create a

false impression that the Respondent had vacillated on the question of self-defense; does not provide the court with factual background concerning *other* court appointed attorneys who had been assigned to Respondent under the first two indictments.[1] Although the right to a self-defense does not require qualifying reasons under the principles of *Faretta v. California,* 422 U.S. 806 (1975). Respondent feels it is essential that the court be aware of his reasons to attempt to proceed without counsels going into his second trial. It was for this purpose Respondent requested his affidavit,[2] which was filed with the original petition in this Cause, be made a part of the JOINT APPENDIX. Please see A 57 thru A 85.

SUMMARY OF THE ARGUMENT

Respondent respectfully contends he was deprived of his fundamental right to defend himself without counsel because of the incessant interference by two stand-by counsels. Not one, but two counsels, were forced upon Respondent in his trial, who actively interfered with Respondent's efforts to conduct his defense. Even though the unanimous panel of the United States Court of Appeals found sufficient facts reflected in the available trial record and determined the Respondent was, in fact, denied his constitutional right of self-representation by unwanted interference of court appointed stand-by counsel, not all the activities by these two

[1]Over a period of 13 months Respondent was indicted a total of four (4) times; each alleging the same robbery. Petitioner's term, "aggravated," was never used in the accusation.

[2]The affidavit is simply a spontaneous utterance by Respondent which describes the conduct of all the attorneys in and out of the courtroom.

stand-by counsels are reflected in the available trial record. If the court is to consider the "Harmless Error" Rule, and reaches a point in its deliberations which may possibly overrule the Panel's finding that such activities were not harmless, then *all* the activities of these two stand-by counsels should be considered and evaluated in terms of quantity and/or quality, for determination of the apparent effect on the trial of this case. On the other hand, if the court considered the Petitioner's suggested "Genuine Opportunity" rule, then only the isolated efforts by the pro se defendant, without regard to the activities of the two stand-by counsels, would need review. Establishment of a "Genuine Opportunity" rule in this case, within the framework advocated by the Petitioner, would become something of the nature of a third party in a trial permitted to "do or not to do anything" they wished, with a trial court acting only "if some problem or situation arises." Finally, if its conceivable for unscrupulous counsels to "sandbag" the prosecution, it is even more conceivable for unscrupulous counsels, in the absence of restraint & guidelines imposed by the trial court, to "sandbag" the defense with a significant degree of certainty for mistrial or conviction.

ARGUMENT

I.

RESPONDENT WAS DEPRIVED OF HIS RIGHT TO SELF-REPRESENTATION ON ACCOUNT OF INTERFERENCE BY STAND-BY COUNSELS' ACTIONS.

As indicated by the available record, stand-by counsels continually interrupted the proceedings, made objections,

ordered Respondent about, cursed, and even disobeyed the trial court's specific instructions. Respondent contends these actions by the stand-by counsels deprived Respondent of his asserted right to defend himself without counsels as found by the Panel in the court below. However, the available record does not reflect the entirety of stand-by counsels' actions occuring during the trial of this case. During state appeal process Respondent was denied records which he had specifically requested in his timely designation for matters to be included in the record on appeal. Among these missing records included a transcription of the recorded testimony given by Respondent during pretrial hearings on the 7th day of December, 1972 and January 11, 1973, describing the conduct of the court appointed attorneys assigned to him at those times. Subsequently, unable to obtain these records, Respondent made an affidavit for the purpose of describing the adverse conduct of all the attorneys; matters of which Respondent believed he could prove up in an evidentiary hearing. This affidavit was filed with the original 2254 petition leading to this court following the granting of the writ by Court of Appeals. The Court of Appeals, on the basis of what was reflected in the available record, granted the writ and, apparently, found no good reason to address the undisputed allegations tendered by the Respondent in his affidavit. But these are still facts relating directly to the issue before this court. Also, where the Petitioner's brief states Respondent "requested the appointment of counsel." (Brief pages 3, 2nd para., 4, 2nd paragraph), on three occasions, the reader could easily get the impression Respondent vaccilated on the question of self-representation. These requests for assistance of counsel are reproduced in the JOINT APPENDIX at A-54, 55 & 56. And the undisputed explanations for these specific requests are also reproduced in the JOINT APPENDIX at

A-76, 77 & 84. Therefore, if the court is to give any weight to Petitioner's statement that Respondent "requested assistance of counsel," the matter should be viewed in the full context.

A. The Record Does Not Reflect The Entirety Of Interference By Stand-by Counsels

Following are examples of active interference by stand-by counsels that are not necessarily reflected in the trial record, described in Respondent's affidavit and reproduced in the JOINT APPENDIX at:

A-80, "Every time I started to cross-examine a prosecuting witness, Mr. Graham would punch me and start whispering in my ear..... most of what he said was nothing but gibberish. . . . . "

"Judge Woods called a recess about every 20 or 30 minutes. During these periods Mr. Graham would walk around my chair back and forth, cussing me. . . "

A-81, "I knew, beyond any doubt, that he was working for the Prosecution. . ."

A-82, "But Mr. Samples argued against me that it should remain in the charge. Judge Woods changed his ruling and went with Mr. Samples. . . ."

"Mr. Graham got up and started his closing arguments to the jury, the first thing he said was something like: Ladies and Gentlemen, this 60 year old man over here. . . . and motioned toward me. . . ."

A-83, "Just as I sat down, Mr. Samples began alapping me

on the back, saying loudly: Good Show! Good Show! . . . . . .it's for certain the jurors would remember this clearly."

Obviously, when stand-by counsels are seated closely to a Defendant who is attempting to conduct a pro se defense, the whispering and punching one's back cannot be recorded. The trial record reflects only one of Respondent's complaints about the whispering by the stand-by counsels:

JOINT APPENDIX, A-35, beginning last paragraph into next page:

DEFENDANT: "Well, your honor, at times when the defendant is listening to the testimony and or questioning, cross-examining or examining a witness, now, will you ask counsels to wait until the testimony is over or hold up the proceedings for a moment, because the defendant can't listen to their voice and at the same time listen to the testimony."

THE COURT: "Alright. You can hold up your hand and I will stop the proceedings."

Although the record doesn't appear to place this in the context of Respondent's complaints about the constant whispering by stand-by counsel Graham, the following statement by Mr. Graham was on account of such complaints:

JOINT APPENDIX, A-31, first para.:

MR. GRAHAM: "I will sit third chair from now on. I will move back one notch."

After Mr. Graham "moved back one notch," Mr. Samples, the other stand-by counsel, moved directly behind Respondent. A part of Respondent's affidavit, reproduced in the

JOINT APPENDIX, at A-80, about the middle of the second paragraph, states:

> "Then Mr. Samples moved directly behind me and started doing the same thing. At one point I got so sick of this, I grabbed my chair and scooted it out and away from the table and the lawyers."

Respondent will not pretend to cite authorities and argue the law on one's right to self-representation. The appropriate law and logic involved in this case has been more than adequately briefed by Respondent's court appointed attorney. The only purpose for this pro se, supplemental, brief is to present the court with these additional relevant facts.

B. The Uncontrolled Actions Of Stand-by Counsels Provide Opportunity For "Sandbagging" Defense Efforts.

Up to this point there has been discussion about the possibility that the application of the rule established by the Fifth Circuit Court of Appeals, that stand-by counsels are to be "seen and not heard," may provide opportunity for unscrupulous counsels to "sandbag" the prosecution. Respondent contends that anytime two stand-by counsels are forced upon a defendant who is attempting to conduct his own defense, without counsels, the opportunity these counsels have, if they are unscrupulous, for undermining, or "sandbagging," the defense is even greater than the possibility of their "sandbagging" the prosecution - unless their actions are controlled by the trial court. Since November, 1972, Respondent has consistently claimed that the court appointed attorneys assigned to him were deliberately acting to undermine his defense. . . "and were part of the prosecution." Please see Respondent's

affidavit reproduced in the JOINT APPENDIX at A-57, para. 3, A-65, para. 2, A-67, last para., and A-68, para. 2, for examples. Whether the court assigns any credibility to these allegations or not, they still remain undisputed. The point is, believable or not, it is conceivable that the uncontrolled actions of stand-by counsels can undermine, or "sandbag," a defense with a significant degree of certainty for mistrial or conviction. A citizen-defendant who asserts his or her right for self-representation is entitled to the court's protection from this.

CONCLUSION

Respondent prays that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully Submitted,

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